PUBLIC PROSECUTOR

v.

MOHD. ISA BIN DIN

HIGH COURT MALAYA, TAIPING
TUAN ZULKEFLI BIN AHMAD MAKINUDIN JC
[CRIMINAL APPEAL NO. 51-74-94]
10 NOVEMBER 1994

REVENUE LAW*: Notice under s. 79 Income Tax Act 1967 - Whether valid - Act of issuing notice - Whether a judicial function - Whether signor of notice acted mechanically and therefore had not issued notice "under his hand" - Failure to disclose IRD Forms CP102 and CP103 together with notice - Whether fatal.*

WORDS & PHRASES*: "under his hand" - Section 79 Income Tax Act 1967.*

This was an appeal by the appellant against his conviction and sentence for an offence under s. 120(a) of the Income Tax Act 1967, for failing to furnish the necessary information regarding his tax chargeability to the Director General of Inland Revenue within 30 days after being served with a notice under s. 79 of the Act. The main ground of appeal was that the notice was invalid as it failed to comply with the requirement of the said section. The appellant alleged that PW3, the IRD officer who signed the notice, was not the officer who actually prepared and studied the notice, and that being so, he must have signed the same in a mechanical way and not judiciously, and therefore had not signed it "under his hand" as required by s. 79 of the Act.

Held:

[1] Contrary to the contention of the appellant, PW3 did more than merely signing the notice. PW3 was the IRD officer who directed PW1 to conduct an investigation into the tax chargeability of the appellant. That apart there was also evidence that PW3 was in the investigating team that conducted a raid on the business premises of the appellant. In the circumstances PW3 cannot be said to have acted mechanically when signing the said notice.

[2] In any event, the act of issuing a notice under s. 79 of the Act is nothing more than an act requiring the person named in the notice to duly comply with the requirements of the notice. This act cannot be equated with the exercise of judicial function as when such powers were exercised under by s. 141(i) of the Criminal Procedure Code or s. 15(4) of the Copyright Act 1969. As long as the IRD officer who signed the notice is an officer vested with the powers under s. 136(4) of the Act, as is the case with PW3 here, the act of signing is valid and proper.

[3] On the facts the IRD Forms CP102 and CP103 mentioned in the notice had been served on the appellant. But even if this was not the case, such failure would only tantamount to a curable defect under s. 143(1)(b) of the Act.

[4] The issuing of the notice by way of A.R. card is a recognised mode of service of notice to the taxpayers. If at all, it is only the deeming provision of subsection (2) of s. 145 of the Act that is not applicable to service by A.R. card. However, if from the evidence it is shown that the appellant had been served with the notice and the IRD had in fact received back the A.R. card duly signed by the receipient, as happened in this case, then the service by way of A.R. card is valid and proper.

[5] Section 120 of the Act defines the offence under which the appellant is charged and the definition itself creates an exeption. Since the offence under s. 120 contains a special exception the

learned Magistrate was right when he stated that the burden of proving the existence of circumstances bringing the case within that exeption was upon the appellant and the Court shall presume the absence of such circumstances. This is consistent with the requirement of s. 105 of the Evidence Act 1950.

[Appeal dismissed]

Cases referred to:
Public Prosecutor v. Then Mee Kom and *Public Prosecutor v. Chan Kam Lai* [1983] 2 MLJ 344 ***(dist)***
Public Prosecutor v. Phua Thian Kang [1971] 2 MLJ 149 ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 79, 120 (a)
Criminal Procedure Code, s. 141(1)
Copyright Act 1969, ss. 15(4), 141 (1)

For the appellant - Hira Singh; M/s. Asbir, Hira Singh & Co.
For the respondent - Kok Keng Fai, Senior Federal Counsel.

JUDGMENT

Zulkefli Bin Ahmad Makinudin JC:
This is an appeal against the conviction and sentence of the appellant for an offence under s. 120 (a) of the Income Tax Act 1967 ('the Act'). The charge against the appellant reads as follows:

> That you, having been required by the Director General of Inland Revenue under s. 79 of the Income Tax Act, 1967 by a notice in writing dated 11 January 1991 which was served on you on 12 January 1991 to furnish him within thirty days from the date of service of the said notice, with the information as required in the said notice without reasonable excuse failed to comply with the notice, and that you thereby committed an offence under s. 120(a) of the Income Tax Act, 1967.

The prosecution called three witnesses to prove its case. PW1, an Assessment officer of the Inland Revenue Department ['IRD'] attached to the Investigation Unit gave evidence that he prepared the notice [Exhibit P1] to be served on the appellant. The notice P1 required the appellant to furnish the information required to the Director General of Inland Revenue ['DGIR'] within 30 days from the date of service of P1 on him. PW1 stated that P1 was not signed by him but by PW3, his immediate superior who held the post of Assistant Director of the IRD. PW1 went on to state that the notice P1 was sent to the appellant under A.R. registered post. P1 was addressed to "Encik Mohd. Isa Bin Din, No.5 Kampong Dew, 34400 Simpang Ampat Semanggol." This was also the name and address given on the postal acknowledgement card [Exhibit P4] and the signature on P4 also purports to be that of Encik Mohd. Isa. PW1 also stated that within 30 days of P1 being served on the appellant there was no reply to P1. PW2, a despatch clerk of the IRD testified that he received in the course of his duties P1 to be posted to the appellant. PW2 further stated that he sent out P1 by way of A.R. registered post on 11th January 1991 to the appellant. The date of the sending out of P1 to the addressee was recorded in the Record Book [Exhibit P5]. PW2 also stated that he received back the postal acknowledgment card P4 in the name of the appellant and had its date of receipt recorded in P5. PW3 in his evidence stated he signed P1 by virtue of the powers vested in him under the Act. PW3 also stated he directed PW1 to prepare P1 and he made the decision as to whether P1 was to be sent out or not. It was also in evidence that PW1 and PW3 were in the team of the Investigation Unit of the IRD which on 30 October 1990 had conducted a raid on the business premise of a partnership in which the

appellant was a partner. Documents related to the tax chargeability of the partnership were seized by the raiding team and three search lists (Exhibit D2ABC) were issued by the IRD.

The appellant was called to make his defence after the learned trial Magistrate found the prosecution had proved its case beyond all reasonable doubt. On the advice of his counsel the appellant elected to remain silent. The learned trial Magistrate in his grounds of judgment was found to have stated that the Court thereafter reviewed the evidence so far adduced and found that the appellant had not raised a reasonable doubt on the prosecution case and hence found the appellant guilty of the offence charged.

Encik Hira Singh, Counsel for the appellant advanced before me a number of grounds of appeal. Some of these grounds merited consideration and deliberation as they involved questions of law on the interpretation of the relevant provisions of the Act and on the burden of proof for the prosecution in proving its case against the appellant.

The appellant's main ground of appeal is that the notice P1 was invalid for non-compliance of the requirement of s. 79 of the Act. Firstly it was contended that the notice P1 signed by P1 was not signed "under his hand". For the appellant it was contended by the use of the words "under his hand" as they appeared in s. 79 of the Act it would mean only the IRD officer who prepared and studied P1 and who subsequently would act on the information furnished could issue the said notice P1. In this context to the appellant it was PW1 and not PW3 who should be signing P1 and who subsequently would act on the information furnished to him under P1. It was the appellant's contention that PW3 was acting mechanically and not judiciously when he signed P1 as he had acted in signing P1 without any material or evidence before him.

For the appellant the use and the meaning of the words "under his hand" appearing in other statutes were referred to in support of his contention. The provision of s. 141(1) of the Criminal Procedure Code reproduced below was quoted:

> If after taking the evidence for the prosecution the Magistrate is of opinion that on the evidence as it stands there are sufficient grounds for committing the accused for trial he shall frame a charge ‘under his hand’ declaring with what offence or offences the accused is charged.

The cases of *Public Prosecutor v. Then Mee Kom* and *Public Prosecutor v. Chan Kam Lai* [1983] 2 MLJ 344 were also referred to on behalf of the appellant to support the proposition that only the IRD officer who actually prepared and studied P1 and who subsequently would act on the information furnished to him under P1 could come within the use and the meaning of the words ‘under his hand’ in s. 79 of the Act. Ajaib Singh J (as he then was) in the above two cited cases on the use and the meaning of the words ‘under his hand’ in relation to the provisions of the Copyright Act 1969 had this to say at page 345:

> In this case a search warrant was ordered by the Magistrate on 10 February 1981. The search warrant itself was however not signed by this Magistrate but by the Registrar of the Sessions Court. This in my view was improper and rendered the search warrant invalid. Under s. 15(4) of the Copyright Act the search warrant must be signed by the Magistrate who issues it and not by any other officer of the Court. The relevant words in subsection (4) of s. 15 of the Copyright Act are that the Magistrate “may issue a warrant under his hand”. This clearly means that the Magistrate who considers the information on oath for the issue of a search warrant under s. 15(4) has to sign the warrant himself for otherwise he is not issuing it under his hand. In short this judicial function of the Magistrate cannot be delegated.

With respect to the learned Counsel of the appellant's submission on his comparison and reasoning of the use and meaning of the words "under his hand" under s. 79 of the Act

with the provisions in other statutes, I am of the considered view that the act of issuing the notice P1 is nothing more than an act requiring the person named in the notice to duly comply with the requirements of the notice. The act of issuing P1 by IRD officer cannot in my view be equated with the exercise of judicial function and should not be construed in the manner cited by the Counsel for the appellant as when such powers were exercised under s. 141 (1) of Criminal Procedure Code and under s. 15(4) of the Copyright Act 1969. It is my view that as long as the IRD officer who signed the notice P1 is an officer vested with the powers under s. 136(4) of the Act, the act of signing P1 is valid and proper. In this case PW1 being an assessment officer of the IRD did not have the authority to sign P1. It was PW3 being an Assistant Director of IRD who had the authority to sign P1 by virtue of s. 136 (4) of the Act which states as follows:

> Senior Assistant Director and Assistant Directors of Inland Revenue may exercise any function of the Director General under this Act (not being a function exercisable by statutory order or a function exercisable under s. 152) except his functions under s. 44, 123, 137(2) and 150:
>
> Provided that the Director General may by writing under his hand authorize any Senior Assistant or Assistant Director of Inland Revenue (subject to any exceptions or limitations contained in the authorization) to exercise his function under s. 123.

I also find contrary to the contention of the appellant there were materials and evidence before PW3 for him to act when he signed P1. PW3 did more than merely signing P1. On the evidence adduced from the Records PW3 was the IRD officer who directed PW1 to conduct an investigation into the tax chargeability of the appellant. PW3 examined P1 before directing PW2 to send it out to the appellant. There was also evidence that PW3 was in the investigating team that conducted a raid on the business premise of a partnership in which the appellant was partner.

Secondly, under the same ground of appeal that the notice P1 was invalid for non-compliance with the requirement of s. 79 of the Act, the appellant contended that the contents of paragraphs 1. 2 and 1.5 of P1 requiring the particulars to be furnished to the IRD were not within the class of information required for which notice could be issued under s. 79 of the Act. The contents of paragraphs 1.2 and 1.5 are reproduced as follows:

> 1.2 Penoh dan kembalikan Borang CP102 yang dikepilkan dengan mencatatkan perbelanjaan persendirian dan peribadi mulai dari tahun 1978 hingga tahun 1989 termasuk kedua-dua tahun tersebut.
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> 1.5 Salinan fotostat semua surat perjanjian dan bukti-bukti berkaitan dengan pemilikan, pelupusan harta, tanggungan, perbelanjaan dari semua fakta berkaitan cukai semasa atau yang lepas, sama ada di Malaysia dan seberang laut, yang dilakukan oleh tuan, isteri, anak-anak dan/atau nominee, mulai dari 1 Januari 1977 hingga 31 Disember 1998 termasuk kedua-dua tahun tersebut.

It is clear under paragraphs (a) to (d) of s. 79 of the Act the particulars required to be furnished to the IRD are specific in nature. However paragraph (e) of the said Act appears to me to be an encompassing blanket provision for the furnishing of particulars to the IRD of any particulars not spelt out under paragraphs (a) to (d) of s. 79 of the Act. I am of the view that in as much as the subject matter of the particulars sought for by the IRD comes within the ambit of all facts bearing upon his present or past chargeability to tax as spelt out in the said paragraph (e) of s. 79 of the Act, then the IRD is justified in requiring any taxpayer to furnish such particulars that would assist the IRD in ascertaining the chargeable income of

the taxpayer in accordance with the Act. In this case I find as a fact that the contents of paragraphs 1.2 and 1.5 of P1 falls within the class of information required for which the notice could be issued under s. 79 (e) of the Act.

The appellant also contended that the IRD Forms CP102 and CP103 as mentioned in the notice P1 were not proved to have been served and enclosed in P1. I find as a fact from the evidence adduced they were in fact served and enclosed in P1. At page 49 of the Records under re-examination PW3 stated:

> Borang CP102 and CP103 telah dihantar kepada defendan.
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> Notis yang ada pada saya adalah salinan yang asalnya telah dihantar.

I also hold the view that even if the Forms CP102 and CP103 were found not served or enclosed in P1, it would only tantamount to a defect that is curable under s. 143(1)(b) of the Act. Section 143(1) of the Act states:

> No assessment, notice or other documents purporting to be made or issued for the purposes of this Act shall be quashed or deemed to be void or voidable for want of form or be affected by any mistake, defect or omission therein, if it is in substance and effect in conformity with this Act or in accordance with the intent and meaning of this Act and
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> (a) in the case of an assessment, the person assessed or intended to be assessed or affected thereby is designated according to common intend and understanding; and
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> (b) in any other case, the person to whom it is addressed and any other person referred to therein are so designated.

As regards the period of 30 days given to the appellant to comply with the notice P1, the appellant contended that it was the minimum period given under s. 79 of the Act and hence it was an unreasonable act on the part of DGIR in doing so. On this issue I am of the view that even though it was the minimum period given, it was given within the period allowed by s. 79 of the Act the therefore P1 is still valid and proper.

On the issue of the appellant not being able to comply with the notice P1 because documents belonging to him had been seized in a raid by the IRD officers, I find from the evidence adduced not all documents belonging to the appellant had been seized. Only documents relating to the partnership in which, the appellant was a partner were seized. These documents seized were in fact accessible to the appellant if he so wished to do so. The truth is that the appellant did not respond to the notice P1 at all nor did he ask for extension of time to comply with the notice. In short the appellant can be said to have deliberately ignored the requirements of the notice P1.

On the issue of the use by way of A.R. registered post ["A.R card"] to deliver P1 to the appellant, it was submitted on behalf of the appellant that it was not effected in accordance with the subsection (2) of provision of s. 145 of the Act and the deeming provision of the said section did not apply to the prosecution case. Although under s. 145 of the Act it is only mentioned therein that notices may be served personally or by ordinary or registered post it does not mean that the method of service by way of A.R. card is excluded from its scope. In the case of *Public Prosecutor v. Phua Thian Kang* [1971] 2 MLJ 149 the use by way of A.R. registered post in which the notice under s. 81 of the Act was sent to the taxpayer was found to be a valid and proper. I am of the view that the issuing of P1 by way of A.R. card is to be recognised as one of the mode of service of notice to the taxpayers. If at all it is only the deeming provision of subsection (2) of s. 145 of the Act that is not applicable to service by A.R. card. However, if from the evidence it is shown that the appel-

lant as in this case had been served with the notice P1 and the IRD had in fact received back the A.R. card duly signed or initialled by the recipient then the service by way of A.R. card is valid and proper.

The appellant also raised as a ground of appeal the issue of the burden of proof required by the prosecution to prove its case against the appellant for the offence under which the appellant was charged. At the outset of his submission on this issue Counsel for the appellant contended that the learned trail Magistrate had erred in fact and in law in his failure to undertake a maximum evaluation of the prosecution evidence in accordance with the principles laid down by the Supreme Court case of *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 MLJ 265. It was submitted for the appellant the prosecution has failed to prove its case beyond all reasonable doubt. The learned trial Magistrate decision in particular was attacked on the ground that he did not address himself on the need of proving one of the essential ingredients of the charge in that there was no evidence at all that the appellant failed to furnish the information **without reasonable excuse**. The counsel for the appellant also submitted that the learned trial Magistrate misdirected himself on the burden of proof when in his grounds of judgment he was found to have stated that the onus of proving 'reasonable excuse' as to why the appellant could not reply to the notice P1 was on the appellant.

Although the learned trial Magistrate in his grounds of judgment did not deliberate at length the evidence pertaining to the ingredients of the charge the prosecution has to prove, I hold that on the evidence available and applying the test laid down in *Khoo Hi Chiang's* case the prosecution has proved the ingredients of the charge against the appellant beyond all reasonable doubt. I do not dispute at all the contention of the counsel for the appellant that as the words "without reasonable excuse" appeared as part of the ingredients of the charge, the prosecution has to prove that part of the ingredient. This is consistent with the view held by Sharma J. in the case of *Public Prosecutor v. Phua Thian Kang* [1974] 2 MLJ 149 at page 15 where he stated:

> The laws always presume the innocence of the accused and on that ground the prosecution has to prove every fact necessary to substantiate the charge against the accused. In other words in criminal cases the burden of proof, unless shifted by legislative interference, always falls on the prosecution and in order to warrant a conviction the prosecution has of necessity to lead evidence to meet any defence that may be open to the accused by virtue of the offence defined in the statute. Thus if a statute in the direct description of an offence and not by way of a proviso contains a negative matter the charge must contain an allegation of such negative matter and that allegation itself must also, be supported by *prima facie* evidence.

In this case against the appellant I find as a fact the allegation of such negative matter, that there was an absence or lack of reasonable excuse on the part of the appellant in his failure to comply with the notice P1 supported by *prima facie* evidence.

As regards the appellant contention that the learned trial Magistrate misdirected himself on the burden of proof when the stated that the onus of proving 'reasonable excuse' as to why the appellant could not reply to the notice P1 was on the appellant, I am of the view that there was no misdirection. The learned trial Magistrate was justified in making the said finding after he was satisfied at the close of the prosecution case that the prosecution had proved its case beyond all reasonable doubt. Section 120 of the Act defines the offence under which the appellant is charged and in the definition itself creates an exception. Since the offence under s. 120 of the Act contained a special exception the learned trial Magistrate was right when he stated that the burden of proving the existence of circumstances bringing the case within that exception was upon the appellant and the Court shall presume the ab-

sence of such circumstances. This is consistent with the requirement of the provisions of s. 105 of the Evidence Act 1950 which states:

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions int he Penal Code, or **within any special exception** or proviso contained in any other part of the same code, or **in any law defining the offence**, is upon him, and the Court shall presume the absence of those circumstances.

In the circumstances of this case and on the evidence before the learned trial Magistrate I find that the learned trial Magistrate had made a correct finding of guilt of the appellant for the offence charged. I hereby dismiss this appeal.